SENANAYAKE v. ANNIE YEO

[P.C. (Lord Morris of Borth-Y-Gest, Lord Pearce and Lord Wilberforce) July 15, 1965]

[Privy Council Appeal No. 37 of 1963]

Contract — Purchase of shares in partnership firm — Rescission — Total failure of consideration — False representation — Executed contract — Whether restitutio in integrum possible.

The plaintiff-respondent had paid the sum of $20,000 to the defendant-appellant for five shares of the defendant's holdings in a firm of share and stock brokers. She alleged that the sum had been paid as a result of untrue representations as to the financial position and prospects of the firm. The plaintiff claimed the return of the sum of $20,000. The trial judge dismissed the claim but on appeal to the Court of Appeal, it was held that the plaintiff was entitled to rescind the contract and recover the sum paid by her ([1963] M.L.J. 43). On appeal to the Privy Council, it was argued that the plaintiff was not entitled to recover as (a) she had affirmed her contract and elected to treat it as binding after she became aware of the misrepresentation; (b) it was too late for her to rescind because it was not possible to make *restitutio in integrum;* and (c) she had acted as and had become a partner and her contract therefore had become an executed contract.

Held: (1) on the facts the plaintiff was not entitled to recover on the basis that there had been a total failure of consideration as it was not shown the shares were valueless at the time she agreed to buy them;

(2) the plaintiff was entitled to rescind the contract because of false representation and had elected to do so and she was therefore entitled to the return of the money paid by her;

(3) in the present case there was no technical bar which prevented the plaintiff from succeeding in her claim. It was impossible to say on the facts that the plaintiff had affirmed the contract or that in any way she had precluded herself from taking the course that she adopted. The plaintiff had entered into a contract with the defendant and there was no difficulty about *restitutio in integrum* as between them. She could have her money back and his share in the partnership would not be diminished. The arrangement between the plaintiff and the respondent contemplated a continuing relationship and it would be inapposite to use the word "executed" as being applicable to the contract they had made. The substantial questions were whether *restitutio in integrum* was substantially possible and whether rescission was timely and just and fair, and on the facts it was clearly possible for the defendant to effect substantial restitution and it would be unjust if the plaintiff could not rescind.

Cases referred to:—

(1) *Adam & Adam* v. *Newbigging* (1888), 13 App. Cas. 308.

(2) *Seddon* v. *North Eastern Salt Co. Ltd.* [1905] 1 Ch. 326.

(3) *In re Hull and County Bank, Burgess's Case* (1880), 15 Ch.D. 507.

(4) *Wilde* v. *Gibson* (1848), 1 H.L.C. 605.

(5) *Brownlie* v. *Campbell* (1880), 5 App. Cas. 925.

(6) *Solle* v. *Butcher* [1950] 1 K.B. 671.

(7) *Leaf* v. *International Galleries* [1950] 2 K.B. 86.

(8) *Curtis* v. *Chemical Cleaning and Dyeing Co.* [1951] 1 K.B. 805.

(9) *Long* v. *Lloyd* [1958] 1 W.L.R. 753.

(10) *Mackenzie* v. *Royal Bank of Canada* [1934] A.C. 468.

PRIVY COUNCIL.

W. Pollak and *L. Blom Cooper* for the defendant-appellant.

G. Le Quesne and *M. Heald* for the plaintiff-respondent.

The judgment of the Lords of the Judicial Committee of the Privy Council was delivered by,

Lord Morris of Borth-Y-Gest: This is an appeal from the judgment of the Court of Appeal of the State of Singapore (Rose C.J., Buttrose and Chua JJ.) dated the 28th June 1962 by which the appeal of the respondent from the judgment of Ambrose J. in the High Court of the State of Singapore was allowed. The respondent, as plaintiff, by an action commenced on the 21st July 1959, claimed the sum of $20,000 from the appellant. After a trial which lasted for many days, Ambrose J., by order dated the 3rd November 1961, dismissed the claim. In allowing the appeal the Court of Appeal ordered that judgment be entered for the respondent for $20,000 with costs in that court and below. Their Lordships will refer to the respondent as the plaintiff and to the appellant as the defendant.

The plaintiff's statement of claim which was indorsed on the writ of summons claimed "the return of the sum of $20,000 paid on the 20th April 1959 for five shares of the defendant's holdings in the firm of Sena & Goh, share and stock brokers, of No. 22 Market Street, Singapore, which said sum at the request of the defendant was paid to the firm of Sena & Goh". The basis of the claim was firstly that the sum had been paid as the result of untrue representations made by the defendant and secondly that payment had been made subject to certain conditions which had not been satisfied.

In 1955 the defendant and Goh Teik Teong (Goh) became partners as stock and share brokers. They carried on business under the style of Sena & Goh at 22 Market Street, Singapore. They executed a partnership deed on the 18th October 1955. The capital of the firm consisted of $100,000 of which $51,000 was contributed by the defendant and $49,000 by Goh. From October 1955 the plaintiff worked for the firm in the capacity of a remiser. She did not have access to the books of the firm. They were only available to the partners.

In March 1959 Goh transferred $14,000 of his share in the capital of the firm to each of his two infant children with the intention that each of them should become a partner in the firm. To achieve this arrangement the defendant and Goh executed a deed on the 26th March 1959. It was supplemental to the deed above-mentioned. On the 3rd April 1959 the defendant and Goh

and one Tan Eng Liak (Tan) executed a deed (which was stated to be supplemental to the two deeds mentioned above) under which Tan became a partner in the firm by purchasing $10,000 of Goh's remaining share ($21,000) in the capital of the firm. Tan paid Goh $40,000.

The plaintiff alleged that on the 13th April 1959 she was approached by the defendant who asked her to buy some of his shares in the firm so that she could have a better interest in the firm: the plaintiff alleged that the defendant said that the business was a very good one and that it was a gold mine: that the business was a flourishing one and that she ought not to miss a golden opportunity: he pressed her to purchase ten of his shares (i.e. $10,000 out of his $51,000) for $40,000. The conversation on the 13th April took place at the house of and in the present of Dr. Sybil Kiani. The plaintiff and the defendant and Dr. Kiani all gave evidence as to the details of the conversations. The defendant's account of the events differed vitally from that of the plaintiff. On the 17th April there was a further interview. That took place at the defendant's house. There were present the plaintiff, the defendant, Dr. Kiani, and Mr. Sivam who was introduced by the defendant as his accountant. All four gave evidence at the trial as to the details of the conversations. There was considerable conflict. The plaintiff's evidence was that in the result she agreed to take five of the defendant's shares for $20,000 and that she was told by the defendant to pay that sum into the account of the firm with the Chartered Bank on 20th April. She in fact did so.

Their Lordships do not find it necessary to record in detail the conflicts in the evidence given by the respective witnesses nor to refer to the conditions and stipulations, as opposed to the representations, upon which the plaintiff alleged that her agreement was made. In a careful judgment, after assessing the dependability of the various witnesses, the learned judge held that the plaintiff was induced to buy as the result of a representation made by the defendant. He held, however, that the sale was not made subject to conditions or stipulations. The learned judge, whose findings on these matters were concurred in by the Court of Appeal, said: "I came to the conclusion that the defendant did make the representation to the plaintiff that the firm of Sena & Goh was a gold mine. I accepted the plaintiff's evidence on this point: I saw no reason to disbelieve it. It was corroborated by the evidence of Dr. Kiani which I accepted." Having said that he did not believe the defendant's evidence and that Sivam's evidence impressed him unfavourably he said:— "I found that when the defendant said that the firm was a gold mine, he meant that it was a flourishing business: and that that was what the plaintiff understood him to mean. I also found that the representation was a material one; and that the plaintiff was thereby induced to agree to buy five of the defendant's shares." The learned judge proceeded to hold that the firm was not a flourishing business on the 13th April and the 17th April and that the representation which the defendant had made was false.

Though the plaintiff paid the sum of $20,000 into the bank account of the firm that was only done upon the direction or at the request of the defendant with whom alone she contracted. The firm sent to her an acknowledgment of the receipt of the sum "as consideration paid to Mr. Sena for the sale of $5,000 shares out of his total of $51,000 in the firm": they added "The changes in the partnership will be incorporated in due course and delivered to you." Though, as the learned judge held, the agreement between the plaintiff and the defendant was not made subject to the drawing up of a partnership deed, it was undoubtedly contemplated that there would be a new partnership agreement. The agreement between the plaintiff and the defendant involved that the plaintiff was to become a partner in the firm. It was therefore necessary for the defendant to secure the assent of the other partners. There was likelihood that such assent would be given but the newest partner (Tan) was away. He was holidaying in Japan. The exact date of his return is not material. It was probably about the middle of June.

The plaintiff was told by Sivam that the Malayan Sharebrokers' Association would require a signed statement from her before they would approve of her becoming a partner. As a consequence on the 20th April 1959 she signed a statement that she had been shown the books of account of the firm and the balance sheet as at the 31st December 1958 and that, being satisfied with the position of the firm, she had willingly agreed to accept the five shares assigned to her by the firm as a going concern. In fact, as the learned judge and the Court of Appeal held, she had not then seen the books of account or the balance sheet.

The plaintiff began to act as a partner on the 20th April and she was accepted and treated as a partner by the defendant and Goh. In the weeks following the 20th April she regarded herself as a partner. She attended partners' meetings. She was introduced by the defendant to the staff as a partner.

Certain further facts of importance call for mention. On the 30th April 1959 one Wong paid the defendant $20,000 and acquired five of his shares and became a partner. Though after the 20th April the plaintiff was accepted as a partner by the defendant and Goh she in fact devoted her time to broking operations. Some time later — stated to be in May or possibly early in June — Goh went on holiday. During his absence

she took his place as managing partner. She then for the first time had an opportunity to see the books. She had not seen them before coming to her agreement with the defendant. She had been told by him that she could not see the books until she became a partner. In her evidence she said that when she saw the books she found that there were debts to the extent of some hundreds of thousands of dollars which could not be collected: she also said that the defendant asked her to collect as many debts as possible and mentioned that he had an overdraft amounting to more than $250,000. As a result of what she discovered she complained to Sivam. On the 29th June a meeting of the partners was held. On the 1st July 1959 her lawyers wrote a letter to the firm for the attention of the defendant. They demanded "the return of the sum of $20,000 which she paid to you on or about the 20th April last with a view to buying 5 shares of Mr. Sena's holding in your firm". The letter made it clear that the plaintiff did not wish to have any share in the firm and that failing a return to her of her $20,000 she would take "such proceedings as are fit in the circumstances". The proceedings were subsequently commenced by writ dated the 21st July 1959. The claim was made against the defendant in the terms previously mentioned. The statement of claim did not contain the word "rescission" or the words "total failure of consideration" but asserted that the plaintiff had paid on representations which were untrue and subject to conditions which were unsatisfied. During the trial before Ambrose J. there was discussion as to whether the plaintiff should be entitled to amend her claim to one of rescission: her application to do so was refused.

Though the learned judge found that the plaintiff was induced to pay $20,000 to the defendant as a result of a material representation made by him which was false he held that the plaintiff was not entitled to succeed. Shortly stated his reason was that the plaintiff had paid $20,000 in order to become a partner holding five shares and that she had become a partner: he held that there was no total failure of consideration. In the course of his judgment he said:—

"It was further submitted by counsel for the defendant that the claim for money had and received was not maintainable as there was no total failure of consideration. It was said that the contract had been in part performed and the plaintiff had derived some benefit from it. I accepted this submission. In my view, as from the 20th April 1959, the plaintiff regarded herself and acted as a partner. She was introduced to the staff as a partner by the defendant. She attended partners' meetings. She acted as managing partner when Goh Teik Teong went on leave. She inspected the partnership books, and thereby clearly exceeded the rights of a mere assignee of a partner's share. She was treated as a partner by the defendant and Goh Teik Teong. Whether Goh Ewe Hock and Sylvia Goh, the infant children of Goh Teik Teong, became partners from the 26th March 1959, or merely assignees of parts of Goh Teik Teong's share, they acquiesced in the treatment of the plaintiff as partner. Tan Eng Liak, who became a partner on the 3rd April 1959, and was away in Japan when the plaintiff began to act as a partner, also treated the plaintiff as a partner from the time he came to know that she was acting as a partner."

In the Court of Appeal the learned Chief Justice delivered a judgment with which Buttrose and Chua JJ. agreed. They held that the learned judge was justified in reaching his conclusions as to the facts. They held that the defendant had made a representation, that it was material, that it was false and that the plaintiff had in fact acted upon it. The representation was to the effect that the firm was a gold mine or in other words that its business was flourishing and profitable. The Court of Appeal further proceeded to say that on the findings of the learned judge there was no doubt that the defendant had made the misrepresentation fraudulently and that the plaintiff had acted on it when she had invested her money. They said:— "What she in fact got was an investment in a firm which had a large overdraft at the bank which the defendant himself was not prepared to carry any longer and a number of substantial commitments.... The subsequent history of the firm is, perhaps, not material. There may be explanations for what occurred but the fact remains that this gold mine of a business was shortly afterwards wound up. In the result the plaintiff found herself in possession of five shares for which she had paid $20,000 which were to all intents and purposes worthless."

Having examined the facts in regard to the period from the 20th April to the 1st July the judgment proceeded:— "For that short period of time until she decided wisely enough to resile from the firm, she had the pleasure — the arid, naked honour — of being able to say: 'I am a partner in this brokers' firm'." Finally the learned Chief Justice expressed himself in these words:— "It seems to me in the circumstances of this case that in view of the shortness of time which elapsed between the purchase of the shares and the resiling from the transaction, the appropriate remedy is for the parties to be restored to the same position that they were in before the plaintiff purchased the shares upon the false representation of the defendant. On this view of the position, the plaintiff is entitled to the return of her $20,000, the transaction in effect being regarded as a nullity."

It will be seen that in allowing the appeal and entering judgment for the plaintiff for $20,000 the Court of Appeal based their decision upon two main grounds — viz. (a) that the plaintiff had paid $20,000 on a consideration which had wholly failed inasmuch as she had acquired shares which were worthless, and (b) that she had rescinded the contract and that the parties to it should be restored to their previous positions with the result that the plaintiff was

entitled to have her money back. It was alternatively said that the second ground meant that in effect the transaction was a nullity.

It is to be observed that fraud was not pleaded in the action and was not made the basis of the claim. In supporting the result reached by the Court of Appeal counsel for the plaintiff stated clearly that he proposed to argue the case on the footing that there had been only an innocent misrepresentation. The view of the Court of Appeal that the representation made by the defendant was a fraudulent one may therefore be disregarded. In any event that view did not vitiate their conclusion. In this connection reference may be made to a passage in the speech of Lord Halsbury in *Adam and Adam* v. *Newbigging* [1] when (at page 313) he said: "My Lords it is not necessary in this case to impute fraud to the appellants; the relief sought was not based upon the ground of fraud; but I cannot yield to one argument which was suggested, that I am not to find misrepresentation proved, which is all the respondent need prove, because the facts may prove more, and shew that the appellants must have known the facts to be as they really were, and yet misrepresented them. The respondent is content to shew what the facts were, and that relying on the representations made to him, he entered into a contract from which he seeks to be relieved."

Their Lordships do not agree with the view that the plaintiff was entitled to recover her money on the basis that there had been a total failure of consideration. The evidence does not support a conclusion that the shares which in April the plaintiff agreed to buy were then worthless. There was evidence that even after the dissolution of the partnership there was value in and competition to acquire "the seat, goodwill and assets of Sena & Goh." The seat referred to was the seat of the firm in the Malayan Sharebrokers' Association. Though the business of the firm was very different from the prosperous business it was represented to be it was nevertheless an existing business the shares in which were not shown to be valueless at the time in April when the plaintiff agreed to buy them.

In their Lordship's view if the judgment in favour of the plaintiff is to be upheld it must be on the basis that the plaintiff elected to rescind her contract with the defendant and did rescind it at a time when she was entitled and able to do so and that accordingly she could recover her $20,000. Such basis, which clearly involves that she does not and will not assert any claim to any share in the assets of the partnership, does not however involve that the transaction or agreement into which she entered was a nullity.

The statement of claim endorsed on the writ was framed and expressed with a certain economy of wording. It is however unnecessary to consider whether or not it was in any way deficient: learned counsel for the defendant very properly disclaimed any desire to rely upon any technical pleading points. Counsel for the plaintiff submitted that the pleading in fact alleges all the essential facts upon proof of which the plaintiff was as a matter of law entitled to recover.

Upon the clear and definite findings that the defendant made a representation which was false and which, being material, did induce the plaintiff to pay $20,000 to the defendant, it would seem to follow that upon discovering the falsity of the representation the plaintiff was entitled to rescind and therefore entitled to recover her money from the defendant unless for any reason it had become too late for her to rescind.

The agreement which the plaintiff made was with the defendant. It was at his request that the sum of $20,000 which she was to pay for the five shares that she was to acquire from him was in fact paid to the firm. It is properly to be treated as having been paid to the defendant. It is not necessary for present purposes to analyse the terms of the agreement with precision. It need not be decided whether the position was that the defendant undertook to bring it about that the plaintiff would become a partner or whether the position was that he sold five shares conditionally upon the other partners agreeing to accept the plaintiff as a partner. In fact Goh did accept the plaintiff in that capacity. It may be assumed that Wong did. So also after his return from Japan did Tan. The real question to be determined is whether on the 1st July and on the date when the plaintiff began her action it had become for one reason or another too late for her to be able to rescind.

The submissions advanced on behalf of the defendant (which were made on the basis of the findings of fact of Ambrose J.) would seem to resolve themselves into three main contentions. In the first place it is said that the plaintiff affirmed her contract with the defendant and elected to treat it as binding after she became aware of the misrepresentation. Secondly it is said that in July it was too late for her to rescind because by then *restitutio in integrum* was not possible. Having acted as the partner not only of the defendant but of others it is said that the rights of those others would be affected if there were rescission and that as a consequence rescission was not possible. In the third place it is said that since the plaintiff had acted as and had become a partner, her contract with the defendant fell to be described as an executed contract. In reliance upon *Seddon* v. *North Eastern Salt Company Ltd.* [2] it is said that the plaintiff must fail in her claim because she was

not entitled, on the ground of innocent misrepresentation, to rescind her contract inasmuch as it had become an executed contract.

Dealing with the first of these contentions it was established that it was not until Goh went on holiday that the plaintiff examined the partnership books so as to become aware of the facts in regard to the financial position. It is said however that thereafter the plaintiff continued as a partner and that she summoned a partners' meeting on the 29th June and that by her acts and conduct after obtaining knowledge as to how matters stood she affirmed or elected not to avoid her contract with the defendant. Their Lordships cannot accept this contention. The plaintiff's evidence was that when she looked for the first time into the book which showed the accounts of the firm she learned that there were bad debts which amounted to very considerable sums. She said that at that time the defendant used to telephone to her and ask her to do as much collection as she could. He gave as his reason for his requests that he had an overdraft of over $250,000. The plaintiff in her evidence said:— "I then became very suspicious. I realised that I had been tricked into the business. It was almost the end of June then. I waited till Goh's return. He returned about that time after an absence of a fortnight." It would not have been reasonable for the plaintiff to act precipitately. It was prudent for her to await Goh's return. She then consulted Wong. She went with Wong to see Sivam. They saw Sivam two or three times. She remonstrated with Sivam and said that had she known the state of affairs she would never have become a partner. Sivam endeavoured to assure her that the debts could be collected. She then called for a meeting of the partners. Her action in so doing was eminently reasonable and could not properly be regarded as an affirmation of the contract. The meeting was held on the 29th June. There were present Goh, Wong and Tan as well as the plaintiff and defendant. The plaintiff made complaint that the defendant was hiding things from the partners. The defendant then made the suggestion that the others should put more money into the firm and he threatened to withdraw his guarantee of the overdraft. The plaintiff and the others were not prepared to put more money into the firm. In the absence of agreement the meeting was adjourned to a date in July.

It is said that by calling that meeting and by attending it as a partner the plaintiff precluded herself from avoiding and rescinding her contract with the defendant: it is further said that the indication was that she would have continued as a partner had the defendant at the meeting not stated that he proposed to withdraw his personal guarantee of the overdraft. Their Lordships consider however that she was entitled to make all enquiries and to endeavour to learn all the facts. Her evidence was that on the day following the meeting and again on the day after that she went with Wong to see the defendant. She asked for the return of her money and said that she did not wish to be a partner. The defendant would make no proposal save that she and Wong should advance more money. They then consulted their lawyers. There followed the letter of the 1st July, already referred to, written by the plaintiff's lawyer. On the plaintiff's behalf it was made clear that she was rescinding. She then began her action on the 21st July.

A consideration of the course of events leads their Lordships to the view that it is quite impossible to say that the plaintiff affirmed the contract or that she in any way precluded herself from taking the course that she adopted.

Certain subsequent events may here be mentioned. Early in July the firm was dissolved. Later three receivers and managers were appointed. The plaintiff was one of them. In so acting the plaintiff in no way affected her position as one who had rescinded her contract. The firm had a seat in the Malayan Sharebrokers' Association. Later the plaintiff made an offer to buy the seat and the goodwill and assets of the firm. In fact the seat was sold to the defendant and he carried on business in the name of Sena & Co.

Their Lordships pass to the second contention. It is said that in July the plaintiff could not rescind because *restitutio in integrum* was impossible. It is to be remembered that the contract which the plaintiff rescinded was her contract with the defendant. There was no difficulty as between the two of them. She could have her money back and his share in the partnership would not be diminished. It is said however that the other partners were concerned and that their position would be affected if the plaintiff withdrew and that they were not before the court. But at the date when the plaintiff brought her action against the defendant the firm had been dissolved. There was no relief that the plaintiff wished to have against Goh or Wong or Tan. So far as Tan was concerned he had himself commenced an action on the 4th July: he claimed a declaration that the partnership had been dissolved: the defendants to his action were the defendant and Goh (and also the two children of Goh): the plaintiff and Wong were not made parties.

In *Adam & Adam* v. *Newbigging, supra,* a case with many similarities to the present case, the plaintiff Newbigging was induced by certain misrepresentations made without fraud by the two Adams to become a partner in February 1883 in a business which either belonged to them or in which they were partners with one

Townend. The business was in fact insolvent and later it failed: there were large liabilities. In an action brought by Newbigging in November 1884 he was held entitled to rescission and to repayment of his capital. It is said that in the present case the other partners were not made parties to the litigation whereas in *Adam & Adam* v. *Newbigging* the other partners or alleged partners had been joined. There was however in the circumstances of the present case no reason why the plaintiff should have brought in any other parties. It is beyond doubt that the plaintiff did act as a partner in the firm of Sena & Goh for the few weeks between the end of April and the end of June. If any member of the public wished to make any claim against the firm and its partners in reference to that short period the present litigation would not be a bar. Nor does the present litigation affect the position of any member of the firm except the defendant. While as a general rule it is clear that a judgment or order will not be made if it would affect the rights of third parties who are not before the court the judgment now under appeal does not have that result. The circumstances which may exist where there is a winding-up of a limited company (as for example in *In re Hull and County Bank, Burgess's Case* [3]) are not present in this case. In his speech in *Adam & Adam* v. *Newbigging, supra,* Lord Watson (at page 322) pointed out that in a question of rescission of his contract by a partner, whether in respect of fraud or of misrepresentation, there is no analogy, after insolvency, between the case of an ordinary partnership and that of an incorporated company. A member of a partnership may have relief in the shape of rescission against his co-partners notwithstanding the insolvency of the firm because his liability to creditors is not thereby affected.

In the present case there was no need for the plaintiff to seek an order for the dissolution of the partnership. It had already been dissolved before her writ was issued. She sought no redress against any one except the defendant. Any rights of others in respect of the short period in question (a period much shorter than was a comparable period in *Adam & Adam* v. *Newbigging, supra* are not affected. (See the speech of Lord Watson at page 323 in *Adam & Adam* v. *Newbigging.*) There is no difficulty as between the plaintiff and the defendant in restoring them substantially to the respective original positions in which they were prior to the time when the defendant by his misrepresentation induced the plaintiff to part with her money. The fact that the business of the firm may have been in worse shape by the end of June than it was towards the end of April is in his connection immaterial. In his speech in *Adam & Adam* v. *Newbigging* Lord Herschell at page 330 said:— "I have already pointed out that the enterprise was insolvent to a large amount when the respondent was induced to take a share in it; and I do not think the fact that the extent of its insolvency afterwards increased justifies the contention that *restitutio in integrum* is impossible. To hold otherwise would be to say that where a losing and insolvent business is sold by means of the representation that it is solvent and profitable, rescission could never be obtained if the loss were increased prior to the discovery of the true state of affairs."

There remains the question whether there is a principle of law which precluded the plaintiff from rescinding her contract and which therefore defeats her money claim which was a claim consequential upon her entitlement to rescind and upon her having rescinded. The defendant seeks to meet the claim by relying upon what was said by Joyce J. in *Seddon* v. *North Eastern Salt Co. Limited.* That case related to a contract for the sales of shares. The shares were transferred. The plaintiff complained of a misrepresentation. The learned judge was not however satisfied that, even if there was a misrepresentation (which he doubted), it induced the plaintiff to enter into the contract: nor was he satisfied that it had any effect upon him at all. The claim for rescission was made some months after the plaintiff had carried on the business of the company whose shares he had bought. Having discovered the true state of affairs the plaintiff would appear to have affirmed the contract. The learned judge dismissed the plaintiff's claim which he said was one "to rescind or set aside for an innocent misrepresentation a contract for the sale of property, not executory, but executed and under which nothing whatever still remains to be done."

In his judgment the learned judge referred to certain decisions in cases where contracts relating to the sale of land had been completed and conveyances executed (e.g. *Wilde* v. *Gibson* [4] and *Brownlie* v. *Campbell* [5]).

The decision in *Seddon's* case has often been referred to and recent references (direct or indirect) may be found in such cases as *Solle* v. *Butcher,*[6] *Leaf* v. *International Galleries,*[7] *Curtis* v. *Chemical Cleaning and Dyeing Co.,*[8] and *Long* v. *Lloyd.*[9]

Their Lordships do not find it necessary to discuss these cases or to discuss what was said in *Seddon's* case or to consider the limits of what was decided. There is no need to travel beyond the questions which are raised by the facts of the present case. Those facts relate to a situation which is quiet different from that which arose in *Seddon's* case and from the position in real property cases where property is transferred and where contracts to sell no longer

operate as contracts. The facts of the present case make it more analogous to such cases as *Adam & Adam* v. *Newbigging, supra,* and *Mackenzie* v. *Royal Bank of Canada.*[10] The decision of the Privy Council in *Mackenzie's* case showed that a contract of guarantee like any other contract is liable to be avoided if induced by innocent misrepresentation. In the present case it would not be realistic to say that as soon as the plaintiff began to act as a partner her contract with the defendant fell to be described as an executed one or to say that it could not be rescinded save on the grounds of fraud. The contract between the plaintiff and the defendant did not merely involve that in exchange for $20,000 he would assign five of his fifty-one shares in the partnership to her: it involved that that was to be the prelude to their association as partners. When on the 20th April she begun to act as a partner there was not on any view a closing or completion or fulfilment of the defendant's contractual obligations. There was first the necessity for the defendant to secure the consent of his existing partners to the introduction of a new partner. The date when such assent may be assumed to have been given could only have been a short time before the plaintiff decided to exercise her right to rescind. That was within what was almost a minimum period for ascertaining that she had been deluded. It would on any approach be technical in the extreme to hold that she could not rescind because her contract with the defendant had been "executed" or because for a short period she had had what the Court of Appeal described as "the pleasure — the arid, naked honour — of being able to say: 'I am a partner in this brokers' firm'." But quiet apart from this consideration their Lordships cannot think that on the present facts the stage was reached when the contract between the plaintiff and the defendant ought within some firm or rigid classification to be styled as "executed". The arrangement between the plaintiff and the defendant contemplated a continuing relationship. It contemplated two stages. In the first stage the plaintiff acted as a partner pending her acceptance as such by the other partners. In the succeeding stage the plaintiff and the defendant were to be in continuing contractual association as partners. It would be quite inapposite to use the word "executed" as being applicable to the contract that they had made. In truth the words executed and executory have in argument been given a measure of significance and a rigidity that they need not bear. Of greater importance than seeking in a case such as the present to attach the label of one or other of these words are the questions whether *restitutio in integrum* is substantially possible and whether rescission is timely and just and fair. It would be wrong in the present case to suppose that a sort of iron curtain had fallen which would preclude the plaintiff from seeking relief when she discovered that she had been induced by a misrepresentation. As their Lordships have pointed out the plaintiff's discovery of the facts upon which she could claim to rescind was not possible until after she had, in a formal sense, become a partner. Only then had she the right and the opportunity to see the books. It would be manifestly unfair if in those circumstances the mere fact of becoming a partner debarred her from relief. When she made her discovery it was clearly possible for the defendant to effect substantial restitution. It would be unjust if she could not rescind. In *Mackenzie* v. *Royal Bank of Canada* where the plaintiff was held entitled to set aside a guarantee into which she had entered and to recover certain securities consideration was given to the question as to whether *restitutio in integrum* was possible. In delivering the judgment of their Lordships' Board Lord Atkin at page 475 said:

> "A contract of guarantee, like any other contract, is liable to be avoided if induced by material misrepresentation of an existing fact, even if made innocently. In this case it is unnecessary to decide whether contracts of guarantee belong to the special class where, even at common law, such an innocent misrepresentation would afford a defence to an action on the contract. The evidence conclusively establishes a misrepresentation by the bank that the plaintiff's shares were still bound to the bank with the necessary inference, whether expressed or not, and their Lordships accept the plaintiff's evidence that it was expressed, that the shares were already lost, and that the guarantee of the new company offered the only means of salving them. It does not seem to admit of doubt that such a representation made as to the plaintiff's private rights and depending upon transactions in bankruptcy, of the full nature of which she had not been informed, was a representation of fact. That it was material is beyond discussion. It consequently follows that the plaintiff was at all times, on ascertaining the true position, entitled to avoid the contract and recover her securities. There were subsequent renewals of the guarantee before the plaintiff was advised of the true facts, but counsel for the bank very properly conceded that they would be in the same position as the original guarantee. There is no difficulty as to *restitutio in integrum.* The mere fact that the party making the representation has treated the contract as binding and has acted on it does not preclude relief. Nor can it be said that the plaintiff received anything under the contract which she is unable to restore."

In *Adam & Adam* v. *Newbigging, supra,* even though the business was hopelessly insolvent and was no longer a going concern it was held that *restitutio in integrum* had not become impossible. In his speech at page 317 Lord Halsbury L.C. said:—

> "If the facts are as I have found them to be, what is the difficulty of restoring Messrs. Adam to their former position, a profitless and sinking business? If there were any value in it, any goodwill attached to it, and if it exists or ever existed, they can have it still. It surely cannot be argued because Colonel Newbigging was under the delusion, and continued under the delusion, that he had entered into a *bona fide* concern, solvent and profitable, that he is to be without remedy because he finds out that he was deluded, and continued deluded down to the breaking up of the concern."

In their Lordship's view there was in the present case no technical bar which prevented the plaintiff from succeeding in her claim.

Their Lordships will report to the Head of Malaysia their opinion that the appeal should be dismissed and that the appellant should pay the respondent's costs.

Appeal dismissed.

Solicitors: *Speechly, Mumford & Soames; Park Nelson & Dennes & Co.*

HOCK YEW CO. v. FRASER & NEAVE (M) LTD. & ORS.

[O.C.J. (Gill J.) July 15, 1965]

[K.L. — Civil Suit No. 82 of 1965]

Landlord and Tenant — Agreement — Whether created a tenancy or licence — Breach of contract — Whether injunction can be given to restrain breach or threatened breach.

Practice and Procedure — Injunction — Granting of.

The plaintiffs applied for an injunction to restrain the defendants from locking the gates leading to certain premises occupied by them and further to restrain the defendants from requiring the plaintiffs to vacate from the premises and demolishing the premises. The defendants counterclaimed for an order that the plaintiffs do vacate the premises. The first defendants were the owners of the premises and they had granted a licence to the second defendants to occupy the premises for a monthly fee one of the terms of the agreement being that the said licence could be terminated by one month's notice in writing by either party. The second defendants in turn by an agreement allowed the plaintiffs to use the front portion of the premises as a store. One of the clauses in the agreement provided that the godown was occupied on a month to month basis and that the agreement may be terminated by one month's notice on either side. On September 9, 1964, the first defendants sent a written notice to the second defendants requiring them to vacate the premises by September 30, 1964. The second defendants thereupon wrote to the plaintiffs and asked them to vacate the premises by September 30, 1964. As the plaintiffs did not comply with this notice the second defendants closed the gates leading to the premises. The plaintiffs thereupon instituted legal proceedings against the defendants.

Held: (1) on the facts of this case the agreement did not create the relationship of landlord and tenant between the first defendants and the second defendants but only that of licensor and licensee and therefore the relationship between the second defendants and the plaintiffs was that of sub-licensor and sub-licensee;

(2) the licence between the parties being a contractual licence, its revocation contrary to the provisions of the contract was a breach of contract;

(3) no court would grant an injunction in the case of a contract for the creation of a licence which is not coupled with an interest in land even if the licence is for valuable consideration and therefore the plaintiffs are not entitled to an injunction in this case;

(4) in the circumstances an order could be made for the plaintiffs to vacate the premises on or before August 31, 1965.

Cases referred to:—

(1) *Sherwood (Baron)* v. *Moody & Ors.* [1952] 1 All E.R. 389.

(2) *Addiscombe Garden Estates Ltd. & Anor.* v. *Crabbe & Ors.* [1957] 3 All E.R. 563, 571.

(3) *Wilson* v. *Tavener* [1901] 1 Ch. 578.

CIVIL SUIT.

Mah King Hock for the plaintiffs.

S. E. Teh for the first defendants.

K. A. Menon for the second defendants.

Cur. Adv. Vult.

Gill J.: This is an action for an injunction to restrain the first and the second defendants, their servants or agents from locking the gates leading to the premises at No. 113, Campbell Road, Kuala Lumpur (hereinafter referred to as "the premises") and further to restrain them from requiring the plaintiffs to vacate from the premises and from demolishing the premises. There is also a claim for damages against the second defendants. The defendants counterclaim for an order that the plaintiffs do vacate from the portion of the premises now occupied by them and also ask for damages.

The first defendants are the owners of the premises which is a prefabricated steel frame building standing on a portion of a piece of land comprised in Selangor Certificate of Title No. 1992 for Lot No. 308, section 41 in the Town and District of Kuala Lumpur, of which they are the registered proprietors.

By an agreement dated the 1st day of February, 1963, the first defendants granted a licence to the second defendants to occupy the premises for a monthly fee of $3,000, one of the terms of the agreement being that the said licence could be terminated by one month's notice in writing by either party.

The second defendants in turn by an agreement dated the 15th day of June, 1963 allowed the plaintiff firm to use the front portion of the premises as storage space for a monthly rental of 15 cents per square foot payable in advance on the 15th day of each calendar month. One of the clauses in the agreement provided that the godown was occupied on a month to month basis and that the agreement may be terminated by one month's notice by either side. A further clause in the agreement stipulated that time was the essence of the contract and that the storer (the plaintiff firm) authorised the company (the second defendants) to remove all the storer's goods remaining on the premises at the expiry of 30 days' notice to be given in writing, delivered to their registered office, under registered post and further to pay to the company all costs incurred by their failure to remove their goods by the due date.

On 9th September, 1964 the first defendants sent a written notice requiring the second defendants to vacate the premises by the 30th of September, 1964, as the sale of their Campbell